IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.12/2006.

Sarla Paes, wife of Ariston Pais,
Housewife, resident of H.No.1008,
Baimfor, Assolna Salcete, Goa. ..... Petitioner.

V/s.

1. Sarat Paes, son of late Tome Pais,
landlord, resident of H.No.1006,
Baimfol, Assolna, Salcete, Goa.

2. Rosario Fernandes, resident near
Church, Cumbeabhat, Velim, Salcete, Goa.

3. Angelo Ferandes, resident near
Church, Cumbeabhat, Velim, Salcete, Goa. ..... Respondents.

Mr. M. B. D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the petitioner.

Mr. Sudin M. S. Usgaonkar, Advocate for the respondent No.1.

CORAM : P.V. KAKADE, J.

DATE : 9th October, 2006.

ORAL ORDER :

Heard learned Counsel for both the parties. Perused the record.

The applicant-defendant originally filed Writ Petition No.89/06, however,

by leave of the Court it was converted into the civil revision application.

2. The respondent-plaintiff filed the suit against the defendant for recovery of damages of Rs.10,000/- together with interest at the rate of 18 % per annum on account of cutting of the coconut tree. The plaintiff and the defendant are, admittedly, the neighbours and having properties adjacent to each other. The residence of the plaintiff exists in the property known as “Cazumadem”, situate at Bainfol, Assolna and surveyed under No.7/3 of Village Ambelim. There is a compound wall on the boundary line of the said survey No.7/3 and within the said compound wall there are several fruit bearing trees as well as the place of abode of the plaintiff. The plaintiff came with a case that the defendant No.1 is also residing in the property bearing Survey No.7/2 of the same neighbourhood. On 26.3.2002 at about 8.00 a.m. the defendant No.1 engaged services of the labourers, namely defendants No.2 and 3 and one more person and directed them to enter into the plaintiff's property under survey No.7/3 in order to cut one coconut tree situated within the compound wall of the plaintiff. Inspite of the protest raised on behalf of the plaintiff and other family, there was no positive response and the tree was forcibly cut. Due to such act of the defendant of cutting of the yielding tree and trespass over the property, the plaintiff suffered damage to the tune of Rs.10,000/- and hence the suit.

3. The descendants stoutly denied the allegations made by the plaintiff and submitted that by virtue of Article 2317 of the Portuguese Civil Code his action was justified and hence, denied the liability to pay any damages and sought dismissal of the suit.

4. The trial Judge after hearing both the parties, came to the conclusion that the plaintiff failed to prove that the defendant was liable to pay damages for the said cause of action and dismissed the suit. The appeal was preferred to the District Court. The learned District Judge, however,after hearing both the parties found that the plaintiff had suffered loss/damage due to cutting of the coconut tree. It was further held that Article 2317 of the Portuguese Civil Code did not give right to the neighbouring land owner to enter into the property and cut the tree or the branches without intervention of the Court and as such, also held that the plaintiff had proved the quantum of Rs.10,000/- towards damages and decreed the suit in toto. Hence the present appeal.

5. At the outset, it may be noted that in the course of his Judgment, the lower appellate Court Judge has relied upon the decision of this Court in the case of ***Ms. Eulalia Colaco e Rodrigues and ors. vs. Mr. Gurudas Raikar and others.,*** 1999(2) Goa L.T. 199 wherein this Court

had an occasion to consider Article 2314 of the Portuguese Civil Code vis-a-vis the Indian Easements Act. It is apparent that Article 2314 gives right to the owner of the property who builds with a dead wall on the boundary line, to repair or plaster or paint such wall by entering or erecting scaffoldings in adjoining property. It was held in that case that a owner of the property who builds with a dead wall and if there is any objection raised by the neighbour, the relief has to be sought from the Court. Based upon this observation, the lower appellate Court has found parallel in Article 2314 in order to hold that in cases covered by Article 2317 also the Court permission is implicit.

In order to adjudicate the relevant issue in its prospective, it would be proper to quote both the articles *ad idem* which are as follows :

> "Article 2314 : If it is indispensable to repair any building, erecting scaffolding, place some objects in another's land or to carry over it, the materials for the work, the owner of such another land shall be bound to give consent to the such acts provided he is compensated for any damages which may arise therefrom; in case of unfounded denial or objection the owner of such another land shall be answerable for damages and permission shall be granted by the Court within a period of ten days."

Therefore, it is clear from the wording of Article 2314 that if the neighbouring owner raises any objection for carrying out any work over his property, the intervention from the Court of law could be sought for.

Article 2317 reads thus :

> "It is permissible to plant trees or shrubs at any distance of the divisory line which separates the neighbouring property from the one in which the plantation has been effected. However, the owner of the neighbouring property can uproot or cut the roots which might have introduced into his plot and the branches which might protrude upon the same, so long as it does not cross the divisory line while uprooting or cutting the roots or the branches if the owner of the trees, being called upon to do so, does not comply within the period of 3 days."

Therefore, the two aspects are clear from the wording of Article 2317, the first is that the dominant owner would be entitled to cut the branches of a tree which are protruding over his property if inspite of three days notice the neighbour does not do so. However, this Article is sought to be distinguished from Article 2314 by the learned Counsel for the petitioner on the ground that this article does not contemplate intervention of the Court of law and, therefore, it was submitted that it was implicit in the said article that the aggrieved person would be entitled to enter into the property of

his neighbour in order to cut branches of the tree without seeking legal remedy from the Court of law. This argument has come due to the evident reason that the defendant has, admittedly, entered into the property of the plaintiff and effected cutting of the coconut tree inspite of the protest raised by the plaintiff.

6. Now, in my considered view, no doubt that Article 2317 does not specifically mention that the affected party can seek legal redressal through the Court of law. It would be obvious and in consonance with the rule of law to hold that the defendant in such cases is not entitled to take law in his hand by entering into the property of the adjoining owner for cutting the trees. First of all, this being civil right, he has to approach the Courts of law which are set up for the purpose of seeking redressal of the right of the parties and, therefore, it cannot be said that because there is no specific mention in Article 2317 of intervention from the Court of law, it is by necessary implication that the defendant has right to enter into the property of the neighbour to cut tree. Plain reading of Article 2317 would show that the right bestowed upon the defendant by virtue of Article 2317 is that he is entitled to cut tree or branches which are protruding over his property crossing divisory line which separates the neighbouring property. In my view, Article 2314 of the said Code provides specific provision for

intervention by the Court of law, obviously due to the reason that it gives right to the affected party to enter into the property of the neighbour and, therefore, it states that the Court's intervention should be obtained if the neighbour objects to carry out such work on his property, which is not contemplated under Article 2317. Therefore, I am inclined to hold that the reasoning adopted in this regard by the lower appellate Court does not suffer from any jurisdictional error while interpreting Article 2317 of the said Code.

7. The next question would be of damages awarded to the concerned party to the extent of Rs.10,000/-. The lower appellate Court has observed that there is evidence to show that the tree which was cut was yielding. Moreover, it was further held that besides the fact that it was yielding, the act of the defendant in trespassing over the property of his neighbour was self-sufficient to entail decree of damages to the extent of Rs.10,000/- though there is no specific discussion as to how such amount was specifically quantified. On the other hand, it was submitted on behalf of the petitioner that the point for determination which was framed by the appellate Court was specific to the effect that whether the plaintiff had suffered loss/damages due to the cutting of the coconut tree. In other words, it was submitted on behalf of the petitioner that when the point

specifically framed for entitlement or otherwise, by due to the cutting of the coconut tree, in the absence of any such evidence on quantum of damages, the amount of Rs.10,000/- could not be the proper damages to be awarded. In this regard, I am of the view that the quantification at Rs.10,000/- of the damages appears to be on the excessive side and taking into account the facts and circumstances, including the established fact that the tree was yielding one, I am of the view that the proper quantum of damages would be Rs.3000/-.

8. No more point was urged which could be under Section 115 of the Civil Procedure Code and, as such, I pass the following order :

The revision is partly allowed. The order of the lower appellate Court is set aside to the extent of quantum of damages. It is directed, instead of Rs.10,000/- awarded by the lower appellate Court, damages of Rs.3,000/- should be paid by the revisioner-petitioner, with interest at the rate of 6 % per annum, from the date of filing of the suit till realisation. With this direction, the revision stands disposed of with no order as to costs.

P.V. KAKADE, J.

ssm.